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Unique or Ubiquitous: Art Prints and the Uniform Commercial Code

WENDY C. LOWENGRUB*

Law, in its search for truth and justice through precedence and tradition, often ignores the fundamental meaning of an act or an object. The fine art print is one such example. A recent case in the Southern District of New York held that art prints are unique: "two prints by the same artist and from the same plate are not interchangeable."¹ The court refused to allow the seller of a Picasso print to cure under the Uniform Commercial Code ("U.C.C.") section 2-508² by offering a substitute print from the same plate, printed at the same time, and signed by Picasso to the buyer who claimed breach of contract because of a forged signature on the initial print.³ Presumably, the New York court was dazzled by the cost of the print (\$1.68 million) and by the argument that printing plates wear significantly during printing. Contract law's historic acceptance that a work of art is unique for purposes of specific performance also contributed to the court's holding. This doctrine does not accurately reflect what an art print truly is. An art print, printed from the same plate, by the same artist, and in the same edition, is not unique.

The New York court's holding perpetuates popular misunderstandings about art prints. Uninformed consumers, believing that art prints are unique and limited, have paid hundreds of thousands of dollars for art prints which could be purchased at a poster store for twenty-five dollars.⁴ Nor should the law refuse to enforce contracts and punish unscrupulous buyers of prints because of the mistaken belief that an art print is a unique work of art. Litigation based on art related issues is rising. Large fluctuations in the art market and insurance claims from destroyed or damaged art collections have led increasing numbers of parties to seek redress in court.⁵ By steadfastly maintaining that art prints are unique under the law, courts and lawyers distort the print market by advancing a proposition that is often inaccurate and a disservice to art dealers and consumers alike.

It is not the intention of the author to diminish the artistic value of prints. Art prints can be wonderful, exciting, and fascinating. Contemporary artists are pushing the boundaries of printmaking and producing extraordinary work. Prints

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1. *David Tunick, Inc. v. Kornfeld*, 838 F. Supp. 848, 851 (S.D.N.Y. 1993).

2. U.C.C. § 2-508(2) (1994). This Note will refer to the U.C.C. instead of the New York code because New York has adopted the same language as the original U.C.C. for the pertinent sections.

3. *Tunick*, 838 F. Supp. at 851.

4. See Susan Cohen, *The Art of the Bogus*, WASH. POST, July 18, 1993, § 10 (Magazine), at 18.

5. See Victor Wiener, *Volatile Art World Increases Pressure on Appraiser's Job: Litigation More Likely in Current Market*, N.Y. L.J., Mar. 21, 1994, at S2.

made by Edvard Munch, the Norwegian artist popular for *The Scream*, are considered by many to be at least as artistically successful, if not more so, than his paintings.⁶ *Le Minotauromachie*, the Picasso print which sold for \$1.68 million, is regarded as significant a work of art as his *Guernica* painting.⁷ There are approximately thirteen known signed prints of *Le Minotauromachie*.⁸ Each one is significant, but not different except, perhaps, for a disparity in the condition of the print.

The purpose of this Note is to argue for a change in how the law views art prints. Contemporary art prints within an edition should not be considered unique for purposes of contract law and the U.C.C. In adopting this contention, it is important to understand what a print is before determining questions of law. The first part of this Note analyzes *David Tunick, Inc. v. Kornfeld* in terms of how its holding relates to the nature of art prints. Part II reviews *Tunick's* discussion of cure and specific performance and provides a framework as to how these doctrines should apply to art prints. Part III examines the laws enacted in various states regulating the sale of prints, and how the development of these laws should be reflected by courts in deciding breach of contract cases pertaining to art prints. Finally, Part IV proposes a simple standard under which courts and lawyers can make informed decisions about cases involving art prints.

I. DAVID TUNICK, INC. V. KORNFELD

In *David Tunick, Inc. v. Kornfeld*, the Southern District Court of New York held that an art print "by the same artist and from the same plates" cannot be used to cure a nonconforming tender of an art print.⁹ In this case of first impression, the defendants, Mr. Eberhard Kornfeld and Galerie Kornfeld und Cie, sold a Picasso print entitled *Le Minotauromachie*¹⁰ to the plaintiff, David Tunick, Inc.¹¹ The plaintiff believed that the signature on the print was forged, and sought to

6. See DAVID LOSHAK, MUNCH 9 (1990).

7. RIVA CASTLEMAN, PRINTS OF THE 20TH CENTURY 110 (1988).

8. ALFRED M. FISCHER, PICASSO: DRUCKGRAPHISCHE WERKE DIE SAMMLUNG LUDWIG 27 (1993).

9. 838 F. Supp. 848, 851 (S.D.N.Y. 1993).

10. *Le Minotauromachie* is Picasso's most significant and important print. CASTLEMAN, *supra* note 7, at 108. One commentator describes the print in the following manner:

[T]he Minotaur is confronted by [a] child who . . . holds a candle to blind . . . the manbeast. They are separated by the cruel spectacle of a woman bullfighter tossed by a disemboweled horse. [On the left side of the print] is a man escaping up a ladder, while, above, the scene is viewed by two women at a window ledge upon which two doves are strutting. In the far distance there is a boat—the escaping Theseus of the original tale of the Minotaur perhaps.

Id. at 108-10.

Le Minotauromachie was etched on to a copper plate, and printed by the renowned Parisian printshop, Atelier Lacouriere. *Id.* at 110-11.

11. *Tunick*, 838 F. Supp. at 849.

return the print.¹² The defendant offered a signed replacement print of *Le Minotauromachie* which the plaintiff refused to accept.¹³ The plaintiff subsequently filed suit alleging breach of warranties, fraud, reckless misrepresentation, breach of the duty of honesty and fair dealing, and breach of fiduciary duty.¹⁴ The defendant denied the allegations and filed counterclaims for breach of contract, unjust enrichment, and fraud.¹⁵ The defendant argued that the offer of the replacement print satisfied its right as the seller to substitute conforming goods for the alleged non-conforming tender (the forged print) under section 2-508 of the U.C.C. as enacted by the State of New York.¹⁶ According to the defendant, the plaintiff could not reject the substitute print and seek alternative remedies.¹⁷ The court disagreed and ruled that art prints are unique goods which are not interchangeable.¹⁸

The court based its decision on U.C.C. sections 2-508 and 2-716.¹⁹ Section 2-508 provides for cure by the seller of goods where the buyer revokes her acceptance of the goods.²⁰ The seller may cure a transaction by substituting a conforming tender where the "seller had reasonable grounds to believe [the original tendered good] would be acceptable."²¹ The seller also may get additional time to "substitute a conforming tender" if she "seasonably notifies the buyer" of the decision to cure.²² In this case, the defendant attempted to cure the transaction by offering the replacement print in a timely fashion.²³ As stated earlier, the replacement print was from the same plate as the original print and

12. *Id.* David Tunick, a New York print dealer, purchased the print for \$1.68 million at an auction from the defendant. Sixteen months later, the plaintiff determined the signature was a forgery and sought to return the print. Wiener, *supra* note 5.

13. *Tunick*, 838 F. Supp. at 850. There are only 13 signed prints of *Le Minotauromachie* still in existence. FISCHER, *supra* note 8, at 27-28. It is believed that only 50 impressions were made from the initial plate although Picasso claimed in his lifetime that only 30 prints were made. *Id.* There are 39 unsigned prints most of which are in the possession of the Picasso estate. *Id.*

14. *Tunick*, 838 F. Supp. at 849.

15. *Id.*

16. *Id.* at 851.

17. *Id.*

18. *Id.* at 852. The district court also denied a motion for summary judgment by the defendant on the plaintiff's breach of warranty claim. *Id.* The plaintiff presented sufficient evidence to establish that authenticity of Picasso's signature is in dispute. *Id.* at 850.

19. *Id.* at 850-52.

20. Section 2-508 provides that:

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

21. § 2-508(2).

22. *Id.*

23. See *Tunick*, 838 F. Supp. at 851.

was allegedly signed by Picasso.²⁴ However, the court held that section 2-508 does not apply to the substituting of prints even if they are from the same edition.

Interestingly, the court did not rely on the definition of conforming goods under section 2-106 to determine whether the plaintiff breached the contract by not accepting the substitute. Section 2-106(2) provides that "[g]oods . . . are 'conforming' . . . when they are in accordance with the obligations under the contract."²⁵ The court could have simply found that the delivered print did not satisfy the contract. Instead, the court focused on whether art prints are unique under section 2-716.²⁶ The court noted that "two prints from a series . . . possess distinctive qualities that may impact their aesthetic and economic value" based on the wear of the plate during printing.²⁷ Secondly, the court noted that prints are fragile and their condition varies based on their storage and treatment by their owner which also affects the value of a print.²⁸ In a footnote, the court said both prints were more than forty years old and had been in the hands of several parties which distinguished them from one another.²⁹ Third, the court stated that a party who purchases a print does so because it is "uniquely beautiful, interesting, or well suited to his collection or gallery."³⁰ It is only that one print which he chose which will be satisfactory.³¹ Finally, the court found a legal basis for the uniqueness of art prints in section 2-716 which provides the remedy of specific performance for unique goods.³² The court relied on the official comment to this provision which recognizes "priceless works of art" as historically unique goods well-suited for specific performance.³³ Relying on only two cases, the court noted that the trend in New York is to find that prints are unique goods.³⁴ In ruling against the defendants, the court stated that "[b]ecause prints are unique . . . section 2-508 is not applicable to prints."³⁵

These broad statements about art prints exemplify popular misunderstandings about art prints. The court's holding is unnecessarily broad and inapplicable to the majority of art prints. Moreover, its art-based discussion of the wear of the printing plate, condition of the print, and the aesthetic sensibilities of the

24. *Id.*

25. U.C.C. § 2-106 (1994).

26. *Tunick*, 838 F. Supp. 852; see also JESSICA L. DARRABY, ART, ARTIFACT AND ARCHITECTURE LAW 5-50 (1995) (discussing the *Tunick* court's reliance on § 2-716 and § 2-106).

27. *Tunick*, 838 F. Supp. at 851.

28. *Id.*

29. *Id.* at 852 n.2.

30. *Id.*

31. *Id.*

32. The court stated that under § 2-716(1) of the U.C.C., "[s]pecific performance may be decreed where the goods are unique or in other proper circumstances." *Id.* at 852.

33. *Id.* (construing U.C.C. § 2-716, cmt. 2 (1977)).

34. *Id.* The court relied on *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (1978) (noting that a contract for 600 porcelain seal sculptures from a limited edition of production of 15,000 seals constitutes unique goods) and *Chabert v. Robert & Co.*, 76 N.Y.S.2d 400 (1948) (discussing specific performance in the context of photographic prints). For a thorough review of these cases, see *infra* part II.B.2.

35. *Tunick*, 838 F. Supp. at 852.

purchaser presents a dangerously narrow view of an art print. The purpose of the next sections is to debunk the myths about art prints and provide a background for future courts to hold that prints are not unique.

*A. What is an Original Print?/Is an Original Print
Unique?*

Until the mid-nineteenth century, the primary purpose of printmaking was for reproduction.³⁶ Printmaking techniques focused on the ability to recreate certain images in large quantities.³⁷ As photography quickly overtook the reproductive purpose of prints, the idea of printmaking shifted to the creation of original prints. James Whistler was the first artist to capitalize on the concept of originality in printmaking when he began making impressions in editions and signing them.³⁸ As the notion of original prints became increasingly popular with artists and with purchasers of art, efforts were made to define originality in printmaking. By 1960, the Third International World Art Congress developed a formal definition of an original print which was then adopted by many countries.³⁹

In 1961, the Print Council of America promulgated its standards defining an original print.⁴⁰ A fine art print is original where:

- (1) The artist alone has made the image in or upon the plate, stone, wood block or other material for the purpose of creating a work of graphic art.
- (2) The impression is made directly from that original material, by the artist or pursuant to his directions.
- (3) The finished print is approved by the artist.⁴¹

Other requirements for establishing a print as an original are to destroy or deface the plate from which the print was made and to note the maximum size of an edition on each print.⁴² The standards set forth by the Print Council of America

36. THEODORE B. DONSON, PRINTS AND THE PRINT MARKET 16 (1977).

37. See discussion surrounding techniques of printmaking, *infra* part I.A.3.

38. See *infra* text accompanying notes 112-13.

39. SUSAN LAMBERT, THE IMAGE MULTIPLIED: FIVE CENTURIES OF PRINTED REPRODUCTIONS OF PAINTINGS AND DRAWINGS 32 (1987). Another incentive that helped create a definition of an original print is the treatment of a reproduction versus an original for tax and tariff purposes. Original prints are duty-free while reproductions are subject to duties. PRINT COUNCIL OF AMERICA, WHAT IS AN ORIGINAL PRINT? 13 (Joshua Binion Cahn ed., 1961).

40. PRINT COUNCIL OF AMERICA, *supra* note 39. The Print Council of America was founded in 1956 to "stimulate public interest in original prints." *Id.* at 5. One of the purposes of the Council is "to 'promulgate standards, codes, formulas, and recommend procedures' in graphic arts." *Id.*

41. *Id.* at 9.

42. It is important to point out that the numbers on the bottom of a print, such as 1/25, do not necessarily indicate that the print was the first impression of the series. Printing is sometimes done in several steps, and impressions often get out of order during the process. Alternatively, the number may mean that this is the first print that the artist signed. These numbers in actuality have little significance. See *id.* at 8; see also KATHAN BROWN, INK, PAPER,

have been uniformly adopted to determine what defines an original print.⁴³ Reproduction prints are distinguished from original prints in that they are reprinted copies of original artwork photographed or redrawn on plates.⁴⁴ The artist often has little or no participation in the production of these prints.⁴⁵ This Note only addresses legal issues surrounding original prints.

Originality in printmaking differs from traditional definitions of originality surrounding other forms of art work. In the making of a print, there may be many *original* prints since the specific purpose of printmaking is to create "multi-originals."⁴⁶ Alternatively, there is only one original painting or drawing. It also is important not to confuse the idea of originality with uniqueness. A painting or drawing is unique since there is only one whereas a print from an edition of prints is not unique.⁴⁷ However, an entire edition of prints may be unique if the plate has been defaced or destroyed after the printing of the edition. In its broad holding, the *Tunick* court failed to address these distinctions. An original print no matter how expensive is not necessarily unique.

B. Collaboration

Collaboration between an artist and another individual to produce a work of art is an essential part of the artistic process. In the field of printmaking, collaboration is vitally important as it typically ensures an edition of uniform, high quality prints. The artist and printmaker together ensure the integrity of a print. It is rare that an artist alone produces an edition of prints.⁴⁸ Artists generally turn to professional printers to make prints of their work. In some cases an artist may make the initial drawing on the printing plate, but leave the actual printing up to a printmaker. In other cases, the artist will etch or carve the plate and leave the making of the impressions to the printer. The printmaker must then ensure that prints in an edition are of the same technical quality as well as conform to the artist's wishes.⁴⁹ This collaboration generally guarantees the quality of prints within an edition, and is evidence that the prints within that edition are not unique.

METAL, WOOD: HOW TO RECOGNIZE CONTEMPORARY ARTISTS' PRINTS 3 (1992); DONSON, *supra* note 36, at 69-71.

43. DONSON, *supra* note 36, at 12-13.

44. RALPH MAYER, *THE ARTIST'S HANDBOOK OF MATERIALS AND TECHNIQUES* 574 (Steven Sheehan ed., 5th ed. 1991).

45. *Id.* One might see these reproductions in stores or art galleries entitled "art prints or limited edition posters." *Id.* These terms are simply elaborate names for reproductions made by high-speed machine printers. *Id.* Although these mechanical prints may be sold for hundreds of dollars under fancy names, they are not worth any more than the regular art posters which retail at a fraction of the price. For an interesting and informative discussion about the sale of "art prints and limited edition posters," see DONSON, *supra* note 36, at 3-42.

46. PRINT COUNCIL OF AMERICA, *supra* note 39, at 11.

47. *See id.* at 27.

48. Some artists specializing in prints do have the capability to produce prints themselves. *See BROWN, supra* note 42, at 13. However, even these artists generally employ others to help them with the printing process.

49. *See id.* at 11.

C. Techniques of Printmaking

There are many techniques used by artists and printmakers to produce original prints. Relief prints, intaglio prints, screen prints, lithographs, collographs, and monotypes are the most well-known and popular techniques.⁵⁰ Relief prints are made by cutting away at the surface of a printing plate or block,⁵¹ creating a background area or a negative space which forms the image of the print. Ink is then rolled on the surface of the plate, and the paper is placed directly on the plate. The ink is transferred to the paper by rubbing the back of the paper or running the plate and paper through a press.⁵² The paper picks up the ink from the raised portion of the plate and remains blank or white where the plate has been cut away by the artist or printmaker.⁵³ The most common forms of relief prints are woodcuts or linocuts.⁵⁴ Woodcuts use wooden blocks as the basis for the print while linocuts use linoleum for the printing block.⁵⁵ Nearly any type of wood can be utilized for the printing block. Pine, poplar, cherry, pear, and birch plywood are the most suitable woods for cutting.⁵⁶ The wood can be treated with shellac or linseed oil to harden the wood's surface and to prevent warping, thereby providing a block that can yield a series of good impressions.⁵⁷

Intaglio printing is the reverse process of relief printing and became popular in the fifteenth century.⁵⁸ An intaglio print is made by etching or cutting an image into a metal plate.⁵⁹ The plate is then inked by pushing the ink into the recessed lines of the plate and wiping the surface of the plate clean.⁶⁰ The plate is then placed on a press and damp paper is placed on top of the plate.⁶¹ Both the inked plate and the paper are rolled through the press under significant pressure, forcing the damp paper into the lines and recessions of the plate.⁶² The intaglio image is produced by forcing the paper into those lines and scratches unlike the relief print where the image is formed by the negative space.

There are many techniques used to create images on the intaglio plate. Etching, aquatint, soft ground, lift ground, and photo gravure use acid to "bite lines or

50. JOHN ROSS ET AL., *THE COMPLETE PRINTMAKER* at v-vi (rev. ed. 1990).

51. The image on the printing plate is sometimes referred to as a matrix. The matrix or plate transfers the ink onto the paper. See BROWN, *supra* note 42, at 1.

52. *Id.*

53. ROSS, *supra* note 50, at 9.

54. *Id.* at 9, 46.

55. *Id.*

56. *Id.* at 9-10.

57. *Id.* at 9.

58. KRISTIAN SOTRIFFER, *PRINTMAKING: HISTORY AND TECHNIQUE* 53 (Francisca Garvie trans., 1968).

59. ROSS, *supra* note 50, at 75.

60. *Id.*

61. *Id.*

62. *Id.*

depressions into metal plates.”⁶³ Drypoint,⁶⁴ engraving, crible, mezzotint⁶⁵ prints are made by scratching, engraving, or pitting into the plate.⁶⁶ Acid-bitten plates are generally more durable and longer lasting than non-acid bitten plates during the production of an edition of prints.⁶⁷ However, there are techniques to increase the durability of non-acid bitten plates such as immersing the plate in electrolyte solution or using certain tools to ensure clean lines.⁶⁸

The screen print is another popular technique which is one of the simplest and oldest printmaking procedures.⁶⁹ The screen print is produced by a rectangular or square frame over which fabric is stretched. The fabric is “blocked out” by a wax or lithographic crayon, a brush, or pen filled with blocking substance wherever unprinted or blank areas are to appear.⁷⁰ Ink is then squeegeed or brushed across the fabric producing the image on the paper below. Screen printing is the only printing process which does not reverse the image from the way it appears on the screen or plate.⁷¹ There is no need for a printing press in screen printing, and as a result the process is widely available.⁷² Screen prints are relatively easy to spot in that the ink often looks thick and skin-like on the paper, and has a different texture than all other printing inks.

Lithography differs from the previously discussed printing processes in that it relies on a chemical process rather than a division between inked and uninked areas. The basic lithographic method begins with drawing or transferring an image on a piece of stone or fine-grained metal with an oil-based crayon or oil-based ink. The entire stone is covered with powdered rosin and talc to stiffen the

63. *Id.* For an excellent discussion of intaglio printmaking techniques, see *id.* at 75-130.

64. The drypoint technique became known at the end of the fifteenth century, but artists and craftsmen used the technique infrequently because of its inability to produce a large number of prints. Printmakers nonetheless liked drypoint because of its ability to recreate the richness of lines in a drawing. Drypoint is simply the scratching of an image into the metal plate with a needle. Drypoint produces a “velvety effect” by metal burrs in the plate which are created on the edge of the scratchings and hold a large amount of ink. Burrs are easily worn down with successive printings. Burrs also are created in an engraving, but are generally removed before printing. *Id.* at 82-84.

65. A mezzotint is produced by repeatedly pressing a curved, serrated rocker over the entire surface of a copper plate creating tiny burrs over the surface of the plate. *Id.* at 75. The tiny burrs over the surface of the plate will print as solid black. The image is then created by scraping and burnishing the surface of the plate to reach the desired lines and shades of color. *Id.* at 86-87.

66. *Id.* at 82-87.

67. *Id.* at 82.

68. See *id.* at 82-83.

69. *Id.* at 143. The use of screen printing for artistic purposes did not become popular until the 1930s. To make the process more appealing to fine art connoisseurs, the screen print was renamed as the *serigraph*. *Id.* at 145. Serigraphs remained popular until the rise of Abstract Expressionism in the 1950s. *Id.* Screen prints, without the invented name, reemerged in the 1960s with the advent of Pop Art and Op Art, and remains a popular form of printing today. *Id.*

70. *Id.* at 147.

71. See BROWN, *supra* note 42, at 8.

72. *Id.*

drawing and resist the acids used in further processing.⁷³ A dilution of gum arabic and nitric acid is spread over the entire stone or metal plate depositing a "desensitizing film on the unmarked portions, making [these portions] incapable of further grease absorption."⁷⁴ A thin layer of water is sponged over the stone or metal plate, and the ink is applied. Damp paper is placed on the stone which is then run through a lithographic press. The image that is printed is the reverse image of what is drawn on the lithographic stone or plate. Although the explanation of lithography may seem unduly complicated, lithography itself is a much easier process than the other printing techniques with the exception of screen printing.⁷⁵ Compared with intaglio printing where printmakers had to etch, scratch, and engrave their designs, a printmaker or artist can simply draw or paint with a greasy material on a stone or plate to create an image.⁷⁶

The collograph is a relatively recent printmaking technique which began in the late nineteenth century and became popular in the mid-twentieth century.⁷⁷ The collograph combines the techniques of printmaking and collage.⁷⁸ Various materials are adhered onto the plate so that the plate itself resembles a collage.⁷⁹ The plate or the materials on the plate also can be etched or engraved.⁸⁰ The collograph plate is then printed either by the relief method, the intaglio method, or a combination of both.

Color printing is generally the same for all printing techniques.⁸¹ In multiple plate color printing, a separate plate is made for each color, and then each plate is printed exactly on top of each other on the paper. The darker colors are generally printed first, and the lighter colors are printed later. The one-plate method, known as *à la poupée*, involves the selective inking of an intaglio plate with many colors.⁸² In some cases the color is blended in grooves in the plate itself, and in others, the colored ink is kept in separate parts of the plate.⁸³ It is possible under the *à la poupée* technique to maintain consistent impressions.⁸⁴ Another method of producing colored prints is for the artist or printer to color each print in an edition by hand. If the artist is the one who actually colors the

73. MAYER, *supra* note 44, at 582. Rosin is not used when a metal plate is used. *Id.* at 584-85.

74. *Id.* at 582.

75. Lithography was invented in 1798 by an aspiring playwright who sought to reproduce his work cheaply. ROSS, *supra* note 50, at 191-92. Lithography is the most popular form of commercial printing today, and nearly every mass printed book, magazine, or newspaper is printed by this method. Lithography also remains a favored choice for printing by artists and printmakers. See MAYER, *supra* note 44, at 578.

76. LAMBERT, *supra* note 39, at 77; see also ROSS, *supra* note 50, at 192.

77. ROSS, *supra* note 50, at 132.

78. *Id.*

79. *Id.* at 131.

80. *Id.*

81. BROWN, *supra* note 42, at 35.

82. ROSS, *supra* note 50, at 117-18. A similar technique known as the reduction or subtractive method uses one block or plate to print all the colors of a print. BROWN, *supra* note 42, at 28.

83. ROSS, *supra* note 50, at 118.

84. *Id.*

edition, then it is likely that each impression will be different or unique.⁸⁵ Alternatively, a printer "follow[s] a model the artist provides," so there will be less variance among an edition.⁸⁶ A print that has been hand colored is generally considered a unique print.⁸⁷

D. Monoprint, Monotype, and Unique Impressions

There is a series of printmaking techniques which are, by their nature, unique. The monotype is a combination of painting and printing. An image is painted or drawn with any ink or paint onto any surface that will transfer an image onto paper.⁸⁸ The ink or paint can be transferred to the paper by hand or by printing press. Some of the paint may remain on the surface of the plate, but an exact second print cannot be made, thus the name *monotype*.⁸⁹

The monoprint is a "unique print pulled from a plate that already has an image incised into it."⁹⁰ The plate can be for a woodcut, etching, engraving, mezzotint, lithograph, or any of the earlier discussed printing plates. The artist or printmaker may wipe the ink in a certain fashion or directly paint onto the plate creating a one-of-a-kind image. The artist can then reuse the plate for a series of images without destroying the original etched image. In contrast, the initial image from a monotype is generally destroyed after one printing.

The term "unique impression" has been adopted by Crown Point Press to describe prints in which the artist wants each print to be different without having to draw each print as a monotype.⁹¹ By choosing different paper for each print and/or combining several plates to get a certain individual print, an artist or a printmaker can create a "unique impression."⁹² The "unique impression" differs from the monoprint in that there is no additional drawing on the printing plate itself. The printing plate itself remains unaltered after a print is made.

Arguably, the existence of the monoprint, monotype, and unique impression lends greater credibility to the idea that there is uniformity among the prints produced in a limited edition. The monoprint, monotype, and unique impressions are one-of-a-kind prints whose purpose is to be unique. Limited editions, on the other hand, are meant to produce a uniform series of prints. The law should reflect the differences between these unique prints and an edition print which is discussed below.

85. BROWN, *supra* note 42, at 36.

86. *Id.*

87. *See id.*

88. ROSS, *supra* note 50, at 245.

89. *See* BROWN, *supra* note 42, at 48.

90. ROSS, *supra* note 50, at 347.

91. BROWN, *supra* note 42, at 49; *see also* Nancy Princenthal, *Irrepressible Vigor: Printmaking Expands*, ART NEWS, Sept. 1990, at 134, 139. Crown Point Press is a printing shop founded in 1962 specializing in intaglio printing and woodcuts. BROWN, *supra* note 42, *forward* at III. Crown Point Press has produced prints for such artists as Richard Diebenkorn, John Cage, Wayne Thiebaud, Sol LeWitt, Chuck Close, William T. Wiley, and Elaine deKooning. *Id.* at 54-59.

92. *See* BROWN, *supra* note 42, at 49.

E. Editions

An edition is a group of prints pulled from the same plate and inked in the same manner. An edition may be made up of only two prints or may be as large as 10,000.⁹³ Edition sizes are generally set by the artist or the printer based on the number of quality prints that can be made before the quality of the plate deteriorates.⁹⁴ A quality printmaker will discard prints in an edition which are not up to par.⁹⁵ In addition, printing plates are often discarded or destroyed after an edition or series of editions has been made.

Editions are marked with a print fraction, such as 25/30. The bottom number represents the number of impressions in an edition, in this case thirty impressions. The top number refers to the specific impression but has little meaning about the print.⁹⁶ It does not necessarily mean that the print is the twenty-fifth one printed in the edition, nor does it mean that the print is the twenty-fifth one that the artist signed. It may simply mean that someone in the printshop numbered this print "25." In addition, artists and printmakers may choose not to produce as many prints as indicated in the bottom number of the print fraction.⁹⁷ If the plate deteriorates faster than expected, to maintain the integrity of the edition, the printer may reduce the edition without reflecting that fact in the number on the print.⁹⁸ When there is no difference among prints in an

93. In all likelihood, an edition of 10,000 prints will not be handprinted, but mere reproductions. See MAYER, *supra* note 44, at 547.

An edition also does not include the proofs which are the impressions retained by the artist, the printer, or a publisher. There are commonly three types of proofs: working proofs, artist's proofs and trial proofs. The working proofs are the impressions made while the artist or printmaker is developing the plate and the process by which the final edition is made. Working proofs are often significantly different from the impressions made in the edition. In Picasso's *Le Minotaure*, the impression of the working proofs looked significantly different than the final impression. The image became darker and more ominous as both Picasso and the printmaker reworked the plate unsatisfied with the initial impressions. FISCHER, *supra* note 8, at 27.

Artist proofs and trial proofs are generally indistinguishable from the final edition except that they are marked with an "A.P." (artist proof), "T.P." (trial proof), "E.A." (*épreuve d'artiste*), or "H.C." (*hors de commerce*, apart from the edition). BROWN, *supra* note 42, at 3; DONSON, *supra* note 36, at 73. The printmaker or the artist keeps these proofs for her own record or collection. Occasionally, these proofs are sold on the open market and often fetch inflated prices. See *id.* at 74.

94. BROWN, *supra* note 42, at 1. Market considerations also affect the size of an edition. *Id.*

95. *Id.* Prints in an edition will often have a chop which is a marking on the print identifying the printer, publisher, or workshop. *Id.* at 4. The chop is an integral part of determining the authenticity of a print as it indicates the identity of the printer. It also provides a degree of security about the quality of the print since a good printer will discard bad impressions from an edition. ROSS, *supra* note 50, at 307.

96. DARRABY, *supra* note 26, at 12-15.

97. DONSON, *supra* note 36, at 85.

98. See *id.*

edition except for the print fraction, the court is breaking a contract over a meaningless term.

Within the art community itself, there is controversy over limiting the number of editions of prints and destroying plates after printing. Many argue that the original purpose of prints was to disseminate art and ideas, and the limitation on editions creates artificial boundaries intended to create a more lucrative art market.⁹⁹ Alternatively, it is argued that large editions create storage problems and require a sophisticated system for mass distribution.¹⁰⁰ Moreover, some artists may be concerned that if "they silt up the world with slow-selling images, they may be prevented from making fresh ones."¹⁰¹

This controversy over the limitation of editions provides one of the major arguments of this Note—limited editions provide for control by the artist and printer over the prints themselves to ensure that they are of sufficient quality and in conformation with the artist's intentions.¹⁰² Printers seek to ensure that prints in an edition are of the same technical quality.¹⁰³ Once a reputable artist or printer releases an edition of prints for sale, it is likely that there is no "best" print.¹⁰⁴ The process of limiting editions ensures that prints within that edition are of equal quality and that these prints alone are not unique. While the holding in *Tunick* may be applicable to older prints, it is not applicable to more recent prints where plate deterioration is not prevalent and editions are tightly controlled.

F. Plate Deterioration

A concern of the *Tunick* court was the deterioration of the printing plate or block after several impressions had been made. Deterioration is no longer a serious problem for contemporary prints. Blocks used for woodcuts are generally treated with linseed oil or other protective substances and can yield numerous impressions.¹⁰⁵ Intaglio plates, which are the least durable of all the printing plates, are often treated as well to ensure durability.¹⁰⁶ Silk screens and lithographic stones can also produce large editions of uniform quality.¹⁰⁷ Plate deterioration, however, is still a valid issue for prints produced prior to the twentieth century, when print quality varied significantly.¹⁰⁸ Prints were made from plates which had been overprinted: wood blocks developed cracks, greasy

99. MAYER, *supra* note 44, at 576; see also PAT GILMORE, THE MECHANISED IMAGE: AN HISTORICAL PERSPECTIVE ON 20TH CENTURY PRINTS 22 (1978). The artist, Leonard Baskin, describes the limitation as "'a stupid and vicious practice unhallowed by time' . . . and . . . 'is aberrant to print 50 impressions when 500 are possible.'" *Id.* at 22. Lithograph prints of contemporary artists often command higher prices than prints of some nineteenth century master artists who printed large editions of their work. MAYER, *supra* at 576.

100. GILMORE, *supra* note 99, at 22.

101. *Id.*

102. See MAYER, *supra* note 44, at 576.

103. BROWN, *supra* note 42, at 11.

104. See *id.*

105. See *supra* note 57 and accompanying text.

106. See *supra* text accompanying note 68.

107. DONSON, *supra* note 36, at 89.

108. *Id.* at 158.

lithographic drawings lost their grease, and images drawn onto etching plates could no longer hold ink.¹⁰⁹ But if a print is relatively contemporary (i.e., after 1950) and is part of a series made by a professional printer or adept artist, it is likely that there will be little variation in print quality among a series of prints.¹¹⁰

G. The Condition of the Print

The *Tunick* court's concern about the condition of a print is valid—inadequate storage, framing, and age may affect an art print's condition. But concern about the condition of a good is not simply restricted to artwork. Each time a court faces a question about cure by substitution, it must make a determination about the condition of the conforming good. Certainly a buyer of a print or any other good should not be forced to accept a substitute good that is in substantially different condition than the one that they intended to purchase. A court should simply approach problems with the condition of an art print as it would approach concerns about the condition of any other good.¹¹¹

H. Tunick's Non-Art Related Concerns

Another concern of the *Tunick* court was the decision of the purchaser of a print to pick that specific print. In defense of the *Tunick* court, people often purchase prints for reasons other than the quality of the impression itself. A person may choose a print because of a preference about the print fraction on the bottom of a print. Unsophisticated purchasers of prints may believe that a lower print fraction on the bottom of a print may mean a certain print is more valuable than a print with a higher serial number. Shrewd sellers may use this misunderstanding to prey on innocent purchasers, but, as stated earlier, the print fraction is essentially meaningless.¹¹²

In addition, the price of prints and people's desire for them may be determined by the presence of a signature.¹¹³ The act of individually signing prints did not emerge until the late nineteenth century. The first artists to individually sign their prints were James MacNeil Whistler and Sir Francis Seymour Haden in the 1880s.¹¹⁴ In fact, Whistler doubled the price of his individually signed prints over the price of identical unsigned prints.¹¹⁵ It is argued that the presence of the signature indicates that the particular impression has been approved by the artist.¹¹⁶ Additionally, the signature is thought to promote the idea that the print is the act of an individual and not a machine.¹¹⁷ The print trade reflects these

109. *Id.* at 159.

110. See *supra* text accompanying note 105.

111. For further discussion, see *infra* part II.B.

112. See *supra* text accompanying note 99.

113. DONSON, *supra* note 36, at 92.

114. GILMORE, *supra* note 99, at 10.

115. LAMBERT, *supra* note 39, at 33.

116. *Id.*

117. *Id.*

concepts, and prints with an artist's signature are valued more highly than prints without a signature.¹¹⁸

When a print is made by a reputable printmaker with whom the artist is in close collaboration, the artist's signature does often mean approval and acknowledgment of the impression. In other cases, however, the signature means nothing at all. Salvador Dali granted the rights to reproduce his work en masse before his death in 1989 and signed anywhere from a few thousand to 350,000 blank sheets of paper for impressions.¹¹⁹ Picasso signed tens of thousands of impressions from 1950 until his death in 1973.¹²⁰ A signed Picasso print from an edition sells for more than twice the cost of an unsigned print from the same edition.¹²¹ That moment when Picasso hastily signed the print with the stub of his pencil enormously increased the value of the print. As Picasso himself said, "*Ce ne sont mes oeuvres qu'on a achete mais ma signature.*" ('It's not my art that they are buying but my signature.').¹²²

It is important "to remember that the manual signature . . . is unnecessary for the recognition of a print as a masterpiece of graphic art. If the work is good, the absence of a signature should be irrelevant."¹²³ The signature of the artist may indicate that the artist approved and acknowledged the impression, or, alternatively, the signature simply may mean an artist signed a piece of paper. Unfortunately, the autograph mentality is pervasive in the print marketplace, and there is great disparity in perceived value for signed and unsigned prints. It is inconceivable that the presence of a signature outweighs the value of a print's image.

In sum, uniformity among an edition of prints is a relatively modern phenomenon.¹²⁴ The advent of limited edition prints has led to prints in an edition to be of similar if not equal quality. One of the purposes of printmaking is to produce original limited prints, in which the edition may be unique, but not each separate print. A print which is intended by an artist to be unique will generally be marked as such by being described as a monoprint, monotype, unique impression, or hand colored impression. Other outside factors may cause a print to be irreplaceable such as condition or market availability, however, the law can address this issue without making the *Tunick* generalization that every art print is unique. The holding of the *Tunick* court may be applicable to older prints, but it is too sweeping a generalization to be applicable to contemporary prints.

118. *Id.*

119. Cohen, *supra* note 4, at 26. Interestingly, the Postal Inspection Service has begun selling off 12,000 forged Salvador Dali prints and sculptures it seized while investigating fraudulent print sales operations. Ralph Blumenthal, *12,000 Fake Dalis Under a U.S. Gavel*, N.Y. TIMES, Nov. 6, 1995, at C11.

120. DONSON, *supra* note 36, at 55-57.

121. *Id.* at 56.

122. *Id.* at 64.

123. *Id.* at 62.

124. *See also id.* at 158 ("For a contemporary print, the variation in quality within an edition can be negligible; for an old master print—executed before it became fashionable to cancel the matrix to preclude reprinting—broad and diverse.").

Contemporary edition prints are not necessarily unique and, in many circumstances, are fungible.

II. *DAVID TUNICK, INC. v. KORNFELD*, THE UNIFORM
COMMERCIAL CODE, AND ART PRINTS

A. *Cure and U.C.C. § 2-508*

The authors of the U.C.C. section 2-508 drafted with the purpose of limiting the buyer's ability to get out of a contract.¹²⁵ Section 2-508 provides the seller some recourse from "unscrupulous buyers seeking to escape" unfavorable

125. The right to reject for nonconformity is found in § 2-601 of the U.C.C. It is a codification of the common law "perfect tender" rule which allowed buyers to reject goods for any nonconformity with a contract. Note, *Uniform Commercial Code—Sales—Sections 2-508 and 2-608—Limitations on the Perfect Tender Rule*, 69 MICH. L. REV. 130, 132 (1970); see also Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Road Map for Article Two*, 73 YALE L.J. 199, 206 (1963).

Section 2-601 provides:

Subject to the provisions of this Article on breach installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Section 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial units or units and reject the rest.

U.C.C. § 2-601 (1994).

It is important to distinguish the right to reject for nonconformity from the buyer's right to revoke acceptance. Section 2-608 controls a buyer's right to revoke acceptance and provides, in part:

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
 - (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
 - (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

U.C.C. § 2-608 (1994).

The issue of whether a seller has the right to cure when a buyer has exercised her right to revoke acceptance is somewhat confusing. See Note, *supra*, at 145. Section 2-508(2) provides that "where the buyer *rejects* a non-conforming tender" the seller has an opportunity to "substitute a conforming tender." U.C.C. § 2-508(2) (1994) (emphasis added). The code, therefore, provides for cure where a buyer rejects, but not when a buyer *revokes* her acceptance. See Note, *supra*, at 146. Courts generally follow this rule, however, some do ignore this distinction. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 467 (4th ed. 1995). Interestingly, the *Tunick* court ignored this distinction even though the buyer exercised his right to revoke acceptance of *Le Minotaure* rather than reject the good. *Tunick*, 838 F. Supp. at 850. For purposes of this Note, however, I will simply analyze cure under § 2-508 as it pertains to the interchangeability of art prints.

bargains.¹²⁶ Under this section, the seller can cure with few restrictions within the time of the contract¹²⁷ and can cure with some restrictions after the time for performance of the contract expires.¹²⁸ The restrictions on the ability of a seller to cure by substitution after the expiration of a contract are limited by (1) a seller's reasonable belief that nonconforming tender would be acceptable; (2) seasonable notification to the buyer of the seller's intention to cure; and (3) cure made within a further reasonable time.¹²⁹ According to the official comment for section 2-508, the reasonable belief that non-conforming tender would be acceptable is based on the seller's "commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract."¹³⁰ There is nothing limiting in the language of section 2-508 which would preclude its application to a transaction involving art prints. The decision to allow a seller of art prints to cure under section 2-508 should be based on the commercial knowledge of the art market, the artistic nature of the print, and the expectations of the parties involved.¹³¹

126. Peters, *supra* note 125, at 210.

127. U.C.C. § 2-508(1). For the text of § 2-508, see *supra* note 20.

128. U.C.C. § 2-508(2).

129. *Id.*

130. Official comment 2 accompanying § 2-508 provides some situations in which § 2-508 may apply: strict conformity of documents, and the sale of precision parts or chemicals for manufacturing. The official comment, however, by no means limits the types of transactions to which § 2-508 can apply. It reads:

Subsection (2) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had "reasonable grounds to believe" that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a "no replacement" clause in the contract, the seller is held to rigid compliance.

U.C.C. § 2-508 cmt. 2 (1994).

131. See Casenote, David Tunick, Inc. v. Kornfeld: *Applying U.C.C. Section 2-716 and Uniqueness to a Section 2-508 Analysis*, 45 MERCER L. REV. 1407, 1408 (1994); see also T.W. Oil, Inc. v. Consolidated Edison Co., 443 N.E.2d 932, 937 (N.Y. App. Div. 1982) (suggesting § 2-508 should focus on the "observance of reasonable commercial standards of fair dealing" and "honesty in fact in the conduct or transaction concerned").

Some courts, however, have been reluctant to allow a seller to cure under § 2-508 where there is a major defect in performance of the contract. See *Johannsen v. Minnesota Valley Ford Tractor Co.*, 304 N.W.2d 654, 657 (Minn. 1981) ("It is our view that any right to cure should be limited to cases in which the defects are minor . . ."); *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195, 205 (N.J. Super. 1968) (finding that where there is transmission failure on a brand new car, "'cure' intended under [§ 2-508(2)] does not" apply). Perhaps the court in *Tunick* could have broken the contract based on the fact that a forged signature constitutes a major defect, instead of ruling that art prints are unique and, therefore, not substitutable. This

In the case of fine art prints, cure with a substitute print should be allowed under section 2-508 where the substitute is from the same edition and from the same plate as the print specified in the contract. The substitute should be in the same condition, and the seller must have reasonable grounds to believe that the tender would have been acceptable. Unless the contract itself specifies that a certain print purchased is for a specific reason, substitution under 2-508 should be allowed. There is simply no reason that sellers of prints should be afforded less protection from unscrupulous buyers than sellers of other uniform goods.

B. Specific Performance, Art Prints, and U.C.C. § 2-716

Although *Tunick* addresses the question of substitute performance under section 2-508, its determination about uniqueness is based in part on specific performance. Uniqueness is directly addressed in section 2-716(1): “[s]pecific performance may be decreed where the goods are *unique* or in other proper circumstances.”¹³² The court’s review of uniqueness under specific performance is suspect. The cases that the court relies on to find that “New York courts would find that prints are intrinsically unique” provide no support for the statement.¹³³ There are, however, several cases which address specific performance that provide insight as to how courts should address breach when an art print is involved.

1. Specific Performance Generally

In the case of breach, specific performance of the contract is a remedy provided when goods under a contract are unique or “in other proper circumstances.”¹³⁴ Uniqueness under the U.C.C. focuses on both the inherent nature of the good,¹³⁵ and current market forces and commercial realities surrounding the availability of the good.¹³⁶ Comment 2 to section 2-716 prescribes that the test of uniqueness “be made in terms of the total situation which characterizes the contract.”¹³⁷ Specific performance is generally awarded “in other proper circumstances” based on the economic conditions surrounding the contract.¹³⁸ Additionally, specific performance is used as a remedy if a good “cannot be duplicated” or if no substitute is readily available.¹³⁹

line of reasoning would have prevented the court’s faulty holding.

132. U.C.C. § 2-716(1) (1994) (emphasis added).

133. *David Tunick, Inc. v. Kornfeld*, 838 F. Supp. 848, 852 (S.D.N.Y. 1993).

134. U.C.C. § 2-716(1).

135. A “family heirloom” or a “priceless work of art” is peculiarly suitable for specific performance. U.C.C. § 2-716 cmt. 2.

136. See also *WHITE & SUMMERS*, *supra* note 125, at 271; Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 357 (1978).

137. U.C.C. § 2-716 cmt. 2.

138. See *WHITE & SUMMERS*, *supra* note 125, at 274.

139. Kronman, *supra* note 136, at 358; see also E. ALLAN FARNSWORTH, *CONTRACTS* 860 (2d ed. 1990).

Specific performance has historically been awarded when a good is a priceless work of art.¹⁴⁰ Moreover, most artwork is generally considered unique under the law.¹⁴¹ It is this legal view of art under specific performance that leads to misunderstandings about art prints. An edition of art prints is different from a painting, drawing, handcarved sculpture, or an ancient vase. A priceless work of art such as a painting has no substitute. Although Vincent Van Gogh made at least seven still-life paintings of sunflowers, not one of these paintings is interchangeable. Each sunflower painting differs either in color, perspective, size, or composition. Certain art prints may be as valuable as a Van Gogh sunflower based on the aesthetic quality of the image, number of impressions in an edition, or the reputation of the artist.¹⁴² But as long as more than one print has been made in an edition and is available to the seller, there is a substitute.¹⁴³ The nature of making an edition of prints is such that there will be more than one impression. If a replacement print is available on the open market, the print is not unique and specific performance is not an appropriate remedy.¹⁴⁴

2. New York Case Law and Uniqueness Under Specific Performance

The *Tunick* court's use of specific performance cases to determine uniqueness is disingenuous and misleading. The court finds that there is a trend of cases which indicate that art prints are unique. The court in *Tunick* relies on *Chabert v. Robert & Co.*¹⁴⁵ and *Joneil Fifth Avenue Ltd. v. Ebeling & Reuss Co.*¹⁴⁶ to establish this trend,¹⁴⁷ however, neither case remotely demonstrates the uniqueness of art prints. The court in *Tunick* cites *Chabert* for the proposition that photographic prints are unique. *Chabert*, however, involved a suit for specific performance of the return of perfume oil which the plaintiff considered to be unique and irreplaceable.¹⁴⁸ The ultimate issue in *Chabert* was whether replevin (return of the oil by a sheriff from the defendant) would sufficiently satisfy the judgment against the defendant. The court found that replevin would not be a satisfactory remedy because the sheriff can collect the value of the oil rather than the oil itself which would deprive the plaintiff of the unique value of the oil.¹⁴⁹ *Chabert* relied on *Raferty v. World Film Corporation*,¹⁵⁰ a case from 1917, for its decision.¹⁵¹ The *Tunick* court interpreted *Chabert*'s discussion of

140. U.C.C. § 2-716 cmt. 2.

141. See Drew N. Lanier, *Protecting Art Purchasers: Analysis and Application of Warranties of Quality*, 12 CARDOZO ARTS & ENT. L.J. 191, 207 (1994).

142. *Le Minotauremachie* is one such valuable print. See *supra* text accompanying note 10.

143. See part I.A.1 entitled What is an Original Print?/Is an Original Print Unique?

144. See also Lanier, *supra* note 141, at 207. Lanier notes that with respect to "multiple copies of lithographs" buyers will not have an action for specific performance. *Id.*

145. 76 N.Y.S.2d 400 (N.Y. App. Div. 1948).

146. 458 F. Supp. 1197 (S.D.N.Y. 1978).

147. *David Tunick, Inc. v. Kornfeld*, 838 F. Supp. 848, 852 (S.D.N.Y. 1993).

148. *Chabert*, 76 N.Y.S.2d at 401.

149. *Id.*

150. 180 A.D. 475 (N.Y. App. Div. 1917).

151. *Chabert*, 76 N.Y.S.2d at 402.

Raftery to state that photographic prints are unique. A close examination of *Raftery*'s facts indicates that it does not support the conclusion that art prints are unique. *Raftery* involved a contract between a motion picture distributor and a motion picture director to produce and distribute the director's movie in various movie theaters.¹⁵² As part of the contract, the distributor received twenty-six prints of the director's film.¹⁵³ The distributor subsequently breached the contract, and the director sued in equity for the return of the twenty-six movie prints.¹⁵⁴ In ruling for a return of the prints, the court noted that the prints were "of a unique character."¹⁵⁵ The court, however, was discussing the group of twenty-six movie prints in its entirety, not each separate print. The court continued stating that "[s]trangers have no right to use these positive prints for the production of this picture, and yet if wrongfully used it is impossible to estimate the damage . . . to the plaintiffs."¹⁵⁶ The uniqueness to which the court refers is that the damage to the director-plaintiff is immeasurable, therefore, return of the film by specific performance is the only adequate remedy for the plaintiff.¹⁵⁷ There is no discussion that each individual movie print holds some intrinsic value that another print does not. One would be hard pressed to establish a trend from this case via *Chabert* that there is a trend in New York that art prints are unique.

The *Joneil* case cited by the court in *Tunick* provides no more support for *Tunick*'s holding than *Chabert* and *Raftery*. In *Joneil*, the plaintiff, a retail store, entered into a contract with the defendant, a distributor of collectibles, to purchase 600 porcelain seal sculptures from a limited edition production of 15,000 seal sculptures.¹⁵⁸ The defendant sold more than the 15,000 available seals due to a computer malfunction and was unable to provide the seals requested by the plaintiff.¹⁵⁹ The plaintiff sued for breach of contract requesting monetary damages or, in the alternative, specific performance of the contract.¹⁶⁰ The court noted that the plaintiff "established its prima facie right to specific performance of its contract for 'unique goods' (the seals)."¹⁶¹ The court here is referring to the contract for all of the seals as being unique, not each particular

152. *Raftery*, 180 A.D. at 477.

153. *Id.*

154. *Id.*

155. *Id.* at 476.

156. *Id.* at 482.

157. The common law rule for specific performance is:

[I]f the specific thing contracted for is desired by plaintiff, if it cannot be duplicated, and if his reason for desiring it or the other circumstances of the case are such that money damages would not be an adequate compensation to him for its loss, equity will decree its delivery to him.

Id. (citation omitted).

158. *Joneil Fifth Avenue Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978). The porcelain seals were affectionately called "Akiku the Seal Pup," and part of a larger collection of limited edition porcelain baby animals including "Alfred the Raccoon" and "Fanny the Fawn." *Id.* at 1198-99.

159. *Id.* at 1198.

160. *Id.* at 1199.

161. *Id.* at 1200.

seal. There are only 15,000 such seals available and the plaintiff only has the right to 600 of them. The same situation, in fact, exists for an edition of art prints—a limited edition of art prints printed from the same plate is unique, but each print within that edition is not unique.¹⁶² The *Joneil* court does not state or even imply that there is a difference from one porcelain seal to another. By relying on *Joneil* or *Chabert* to establish a trend, the *Tunick* court treads on shaky legal ground.

3. Case Law Which Is Applicable to Uniqueness and Specific Performance: How a Court Should Examine Facts Under U.C.C. § 2-716

Two seemingly incongruous cases provide a useful setting for examining how courts interpret uniqueness under specific performance: *Sedmak v. Charlie's Chevrolet, Inc.*¹⁶³ and *Scholl v. Hartzell*.¹⁶⁴ In *Scholl*, a Pennsylvania court found that a classic 1962 Chevrolet Corvette is not unique even though it may be considered a collector's item.¹⁶⁵ The court relied on the fact that the plaintiff who sought specific performance of the car made no claim that he was unable to find another 1962 Chevrolet Corvette.¹⁶⁶ The court focused on the traditional definition of unique, availability of a substitute, and found that a collector's item is not unique.

In *Sedmak*, the plaintiff entered into a contract with the dealer-defendant to purchase a limited edition Corvette with specific options.¹⁶⁷ The defendant breached the contract and the plaintiff requested specific performance. The court declined to call the car unique, but allowed specific performance based on "other proper circumstances." It was impossible to obtain a replacement car without significant difficulty and expense.¹⁶⁸ The court noted that the dealer-defendant only had one of the limited edition Corvettes available in a two-year period, and very few of the limited edition Corvettes had the options requested by the plaintiff.¹⁶⁹ This court, as the court in *Scholl*, relied on the availability of a substitute in determining the appropriate remedy for breach.

Since *Sedmak* involved a *limited edition* of automobiles, some may try to directly analogize this to the case of limited edition art prints. If one can order specific performance for breach of contract for a limited edition sports car, then one can order specific performance for a contract involving art prints. This is unsound. A car is not an art print. The car in *Sedmak* was customized according to the plaintiff's specifications—edition art prints by their nature are not customized. If a print is distinct, it will be described as monoprint, monotype, or

162. See *supra* text accompanying notes 46-47.

163. 622 S.W.2d 694 (Mo. Ct. App. 1981).

164. 33 U.C.C. Rep. Serv. 951 (Pa. Ct. of Common Pleas 1981).

165. *Id.* at 954.

166. *Id.*

167. *Sedmak*, 622 S.W.2d at 694.

168. *Id.* at 700.

169. *Id.*

hand colored, not a limited edition print, and specific performance would be an appropriate remedy for breach.

A court should factor in the same questions of market availability of a substitute art print like the *Scholl* and *Sedmak* courts did when faced with a question of specific performance. The plaintiff should be awarded specific performance if a substitute print is not readily available on the market. In such a case, a court could base its finding on "other proper circumstances" like the *Sedmak* court. As with deciding other specific performance cases, courts should simply look towards commercial realities of the marketplace rather than make an uninformed judgment about the uniqueness of prints.

III. LEGISLATION, REGULATION, AND THE PRINT MARKET

The purpose of this section is to focus on legislative and regulatory efforts to control the print market. These efforts, which have proliferated over the past twenty years, will help courts understand the nature of prints and multiples. Since most of the print laws focus on the disclosure of information, courts will have this information at their disposal to help them decide whether a print is substitutable. In addition, attempts to control print quality and information further the importance of limited editions. As discussed earlier, limited editions often lead to greater uniformity among prints in an edition.¹⁷⁰

A. Brief History of Regulatory Efforts

Attempts to regulate prints are not a recent phenomenon. In 1847, the Printseller's Association was founded to control the quality of prints.¹⁷¹ Numerous other associations have arisen to both promote prints and maintain print quality throughout the past 150 years.¹⁷² In 1960, the Third International Congress of Artists in Vienna sought to adopt a definition of an original print to distinguish them from reproductions.¹⁷³ Many countries now use this definition, including the United States.¹⁷⁴

170. See *supra* text accompanying note 102.

171. LAMBERT, *supra* note 39, at 33.

172. Some of the associations are the *Association des Graveurs a l'Eau-forte* in Paris, the *Society of Graphic Artists* in London, the *Associazione Incisori d'Italia* in Milan, the *Sociedad Espanola para el progreso de las Artes Graficas* in Spain, the *Print Council of America*, and the *International Graphic-Arts Society*. SOTRIFFER, *supra* note 58, at 139.

173. LAMBERT, *supra* note 39, at 32. For a draft of the resolution adopted at the Congress, see PRINT COUNCIL OF AMERICA, *supra* note 39, at 28-29. For a discussion of the definition of original print, see part I.A.1 of this Note.

174. PRINT COUNCIL OF AMERICA, *supra* note 39, at 29.

B. Multiple Legislation in the United States

Many states also recently adopted print or multiple laws in an attempt to regulate the print market and protect consumers.¹⁷⁵ These laws require the disclosure of certain information about the print. The details which must be disclosed generally include the following: the total size of the edition; the number of proofs made from a plate; the process and materials used in making the plate and subsequent impression; the year the edition was made; the artist's name and source of signature; the number of editions printed; whether the plate has been destroyed; and whether the print was produced posthumously.¹⁷⁶ This basic information is intended to prevent confusion and deceptive merchandising practices, protect the public, and provide for consumer self-education.¹⁷⁷ There has been some concern, however, in the legal community that these goals are not being met. The enforcement mechanisms of print laws are limited, damage awards are minimal, and injunctive relief often is restricted.¹⁷⁸ Nonetheless, the information which must be disclosed by sellers will help courts decide whether a print has a substitute.

New York and California have also adopted disclosure requirements that depend on the date the print was produced. Prints are separated into four categories: pre-1900, 1900-1949, 1950-1982, and after 1982.¹⁷⁹ Before 1900, the disclosure requirements are slim. The dealer must disclose the name of the artist, the medium and process, the date of the print's production, and the date the master was made.¹⁸⁰ For prints produced between 1900 and 1949, the dealer also must disclose the source of the artist's signature on the print. Dealers selling prints produced from 1949 to 1982 must additionally disclose whether the image

175. The following states have adopted print laws: Arkansas, ARK. CODE ANN. §§ 4-73-301 to -305 (Michie 1996); California, CAL. CIV. CODE §§ 1740-1745.5 (West 1985 & Supp. 1996); Georgia, GA. CODE ANN. §§ 10-1-430 to -437 (1994); Hawaii, HAW. REV. STAT. §§ 481F-1 to -9 (1993); Illinois, ILL. COMP. STAT. 345/1 to 345/9 (1993); Iowa, IOWA CODE ANN. § 715B.1-4 (West 1993); Maryland, MD. CODE ANN. COM. LAW II §§ 11-8A-01 to 11-8A-04 (1990); Massachusetts, MASS. ANN. LAWS CH. 94, § 277C (Law. Co-op. Supp. 1996); Michigan, MICH. COMP. LAWS ANN. § 442.351-.367 (West 1989); Minnesota, MINN. STAT. ANN. § 324.01-.10 (West 1995); New York, N.Y. ARTS & CULT. AFF. LAW § 15.01-.21 (McKinney Supp. 1996); North Carolina, N.C. GEN. STAT. § 25C-10 to 25C-16 (1995); Oregon, ORE. REV. STAT. § 359.300-.315 (1987); and South Carolina, S.C. CODE ANN. § 39-16-10 to -50 (Law. Co-op. Supp. 1995); see DARRABY, *supra* note 26, at App. 21-1 to 21-22.

176. DARRABY, *supra* note 26, at App. 21-4.

177. Susan L. Troxell, Comment, *New York's Sale of Sculpture Disclosure Law: Art Merchant Beware*, J. ART & ENT. LAW 15 (Fall 1991).

178. DARRABY, *supra* note 26, at 12-2; see also Douglas G. Boshkoff, *Art and Law, At Home and Abroad*, 64 IND. L.J. 83, 89-90 (1988) (noting that the disclosure requirements without a comprehensive enforcement mechanism will not help purchasers make informed decisions).

179. CAL. CIV. CODE § 1740 (West Supp. 1996) and N.Y. ARTS AND CULT. AFF. LAW §§ 15.05-.09 (McKinney Supp. 1996). The requirements of the California statute are referred to in this paragraph. The New York statute closely resembles the California statute with regard to the requirements for disclosure. There are, however, some minor differences.

180. See DARRABY, *supra* note 26, at App. 21-4.

is a photomechanical reproduction, whether the artist produced the plate prior to her death and the printing was made posthumously, the size of the limited edition, the number of signed and number prints, the amount of unsigned and unnumbered prints, the number of artist's proofs, the number of publisher's or printer's proofs, and whether the plate was destroyed or defaced.¹⁸¹ The disclosure information for prints produced after 1982 also must include whether the print is from a plate which produced prior editions or is a reproduction.¹⁸² These disclosure requirements provide a helpful basis by which standards can be developed to help courts decide to award or deny specific performance under U.C.C. section 2-716 or allow for substitute performance under U.C.C. section 2-508(2). The development of this standard is the purpose of the next Part of this Note.

IV. A PROPER STANDARD OF REVIEW FOR COURTS

It should be apparent that once it is determined that an art print is not unique, the law is fairly straightforward. Cure under U.C.C. section 2-508(2) may be allowed, and specific performance generally should not be permitted. However, the courts must make that first determination—is a print unique? There are some situations in which prints should be considered interchangeable and other situations where prints should be regarded as unique. For this purpose, courts should be guided by the separate disclosure requirements for print laws based on the year of a print's production. The following paragraphs illustrate an analysis which courts can use when faced with a breach of contract involving an art print.

A court's analysis for purposes of cure or specific performance should begin with determining the year in which the print was produced. If the print was produced after 1950, there should be adequate information available about the technique, size, extent, and authenticity of the edition. A court should be comfortable in finding that a print from an edition of prints in this time period is not unique. Generally, if there is something unique about a specific print it will either be called a monoprint, monotype, a unique impression, or hand colored instead of a limited edition print.¹⁸³ In addition, an unsigned print must be considered different from a signed print no matter how specious that distinction may be.¹⁸⁴

For prints produced between 1900 and 1950, the court's analysis should be slightly different. Less information may be available about the print and the others in its edition. Print laws require that less information be disclosed about these earlier prints.¹⁸⁵ If there is no information available to the court about the print or its edition, a court should find that print to be unique. If, however, there is information available about the size, extent, and authenticity of an edition, then a court should treat the print as fungible. Finally, courts should consider

181. *Id.*

182. *Id.*

183. *See supra* part I.A.4.

184. *See supra* text accompanying note 123.

185. *See supra* text accompanying note 181.

prints produced prior to 1900 to be unique. Even if an edition of prints was made, there was little control over its printing. The impressions from the plate may vary significantly in quality. In most instances, there is simply not enough information on these prints for a court to make a valid determination about uniqueness.

None of the above discussion is intended to require a court to cure through substitution or prevent a court from awarding specific performance for breaches involving contemporary art prints. However, courts cannot solely rely on an immediate determination that an art print is unique simply because it is a work of art. Courts must examine other factors such as the expectation of the parties, the availability of a substitute in the market, cost of obtaining a substitute, and other commercial realities.

CONCLUSION

By finding that each print in an edition is unique, judges and lawyers set a dangerous precedent to encourage art fraud and inflate print prices. Such conclusions imply that prints are more economically valuable than they actually are. In the 1980s, the dramatic rise in the value of prints led to fraudulent prints of Dali, Chagall, and Miro. Unscrupulous dealers swindled thousands of innocent consumers. Unsound holdings about works of art become even more problematic as litigation about art work increases. New York City's auction houses are gaining an increased share of the market for art work over other countries.¹⁸⁶ This factor, combined with a fluctuating market and insurance claims over lost art work, indicates that American courts are going to be addressing increased numbers of art-based cases. The law, therefore, has a great responsibility to ensure that it accurately reflects the value and the meaning of an art print.

186. Souren Melikian, *New York's Gain Is London's Loss; A Shift in the Auction World Is Siphoning Treasures away from the Old World*, WASH. POST, Jan. 18, 1996, at C1.